

DONALD L. SCHULZ
JOHN F. BOSTA

IBLA 93-80, 93-130

Decided September 24, 1997

Appeals from a Decision of the District Manager, Susanville District, California, Bureau of Land Management, denying two requests to terminate a right-of-way grant for underground utility lines and a service road. CACA-22476.

Affirmed.

1. Administrative Procedure: Administrative Review--
Res Judicata--Rules of Practice: Appeals: Generally

Where an individual was afforded the opportunity to protest and appeal from issuance of a right-of-way grant and failed to do so, that individual may not thereafter litigate the appropriateness of the initial issuance of the grant in the context of an appeal from a decision declining to terminate the right-of-way.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Cancellation--Rights-of-Way: Conditions and Limitations

Where the record indicates that the placement of potable water and sewer pipelines is in conformity with state law requirements, a decision declining to cancel a right-of-way for an asserted violation of state spacing requirements will be affirmed.

APPEARANCES: Donald L. Schulz, pro se; John F. Bosta, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Donald L. Schulz and John F. Bosta have individually appealed from a determination of the Susanville District Manager, Bureau of Land Management (BLM), dated November 9, 1992, denying their requests to terminate right-of-way grant CACA-22476, issued to the Stones-Bengard Sanitary Cooperative, Inc., (SBSC) for underground utility lines and a service road. Schulz's appeal is docketed as IBLA 93-80, and IBLA 93-130 is the docket number assigned to Bosta's appeal. Because the appeals challenge the same decision and are based on similar factual and legal issues, they have been consolidated for decision by the Board.

Effective April 26, 1989, the Area Manager, Eagle Lake Resource Area, BLM, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1994), granted a right-of-way with a term of 25 years to SBSC for the construction, operation, and maintenance of a service road and underground utility lines, including stockwater and sewer pipelines, an electrical power line, and a telephone line. The right-of-way area, which is 40-feet wide and 1,830-feet long, containing 1.68 acres, is situated in the SW¼SW¼ sec. 15, T. 33 N., R. 11 E., Mount Diablo Meridian, Lassen County, California.

On July 28, 1989, the Area Manager issued a Notice of Trespass/Cease and Desist Order, charging SBSC with several violations of the terms and conditions of its right-of-way grant. The violations included initiating construction without prior written authorization from BLM in the form of a Notice to Proceed (Form 2800-15 (August 1985)), not following the agreed-upon alignment, and removing trees within 200 feet of the county road. The BLM required SBSC to cease all construction activities until it had applied for and obtained a Notice to Proceed and resolved the trespass by paying trespass damages and rehabilitating and stabilizing affected lands in accordance with an approved plan.

On July 31, 1989, BLM issued SBSC a Notice to Proceed and, in accordance with the terms and conditions of its right-of-way grant, SBSC finished the road and installed the underground lines, which run along the northern edge of the roadway.

On August 28, 1989, SBSC filed an application for amendment of its right-of-way grant "to install a 6-inch (poly vinyl chloride) PVC potable water transmission pipeline (domestic and fire flows) along the south side of an existing service road." Included in this application was a sketch of the "proposed construction section" accompanied by a statement that "no additional clearing will be necessary, and restoration will incorporate presently required erosion control measures." The pipeline was to transport water from a 100,000 gallon storage tank owned by Eagle Lake Properties, Inc., to the Stones Landing Resort Area. The storage tank lies on private land in sec. 16, T. 33 N., R. 11 E., Mount Diablo Meridian, California.

The Land Report for the proposed action, which recommended that SBSC be granted an amendment to the existing right-of-way with certain stipulations, was approved on September 15, 1989. The Area Manager issued a Decision on March 20, 1990, declaring: "Right-of-Way Grant CA CA 22476 is hereby amended to include the addition of one 6-inch PVC potable water transmission pipeline on the south side of the existing service road. The pipeline will be placed no closer than 10 feet from the existing underground lines within the same right-of-way."

On April 26, 1991, the Susanville District Office received a letter from Schulz referring to a telephone conversation on April 23, 1991, concerning the Decision amending the right-of-way grant. In his letter,

Schulz complained of a number of violations and irregularities associated with the application for right-of-way CACA-22476 granted in 1989. On May 6, 1991, Schulz forwarded similar complaints and inquiries related to the right-of-way to the California State Office, BLM. He requested that the State Office reply to his letter, complaining that the Susanville District Office had not.

On May 10, 1991, the Susanville District Office wrote to Schulz in response to his letter of April 24, 1991. John Bosta responded to the May 10 letter from the Susanville District Manager. Therein, Bosta complained that the District Manager's reply letter to Schulz was inadequate, and he alleged that regulatory violations and infractions of state and Federal law had occurred in connection with the application process that resulted in the granting of right-of-way CACA-22476 and its subsequent amendment.

The District Manager then wrote a letter addressed to both Schulz and Bosta on July 3, 1991, responding to Bosta's letter of May 25. The letter notified them that Peter Humm, a District Realty Specialist, had been designated to conduct an investigation into Bosta's allegations so that a comprehensive response could be prepared. This investigation report, completed by the District Realty Specialist on November 3, 1991, formed the "basis and rationale" for the Decision on appeal. See Decision at 2. Thus, with his Decision, the District Manager attached a copy of the report. The Decision further stated, in relevant part, that

[t]his decision is sent to Mr. Bosta and Mr. Schulz because they have both indicated that they wish the Bureau of Land Management to take some action against the holder of the right-of-way, Stones-Bengard Sanitary Cooperative, Inc. Their letters are therefore being considered protests against the continued authorization of right-of-way grant CACA 22476. Their letters are also being considered requests to terminate the right-of-way for failure of SBSC to comply with the terms and condition of the grant, and for failure of the BLM Eagle Lake Area Manager to issue or administer the grant in accordance with regulations and established Bureau procedures.

Based on the findings and conclusions contained in the report by the Susanville District Realty Specialist, Mr. Bosta's and Mr. Schulz's protests and requests to terminate the grant are hereby denied. Right-of-way grant CACA 22476 will continue in accordance with the terms of the grant.

Schulz and Bosta filed timely appeals and submitted statements of reasons (SOR) in support of their appeals. No briefs were submitted on behalf of the Government.

On appeal, Schulz asserts that he opposes the continuation of the right-of-way, listing four specific reasons: (1) The SBSC failed to provide "full disclosure" of information requested on application forms, and

the district manager exceeded his authority is determining that "full disclosure" was not required; (2) he had been unable to obtain documentation to support BLM's statement that the "Health Department of Lassen County" had inspected the construction at the north end of Eagle Lake; (3) BLM gave SBSC a construction variance after the construction was completed, and the construction was not in compliance with the state and county regulations; and (4) the District Manager abused his discretionary authority and granted special privileges to SBSC.

Allegations of impropriety alleged by Bosta in his appeal, like those of Schulz, encompass complaints about SBSC's failure to supply required information on the right-of-way and amendment applications, characterizing BLM's determination that such information was not necessary as arbitrary and an abuse of discretion. Bosta also challenges various statements contained in the investigation report. Finally, he complains that BLM amended the right-of-way grant to eliminate the stipulation requiring a 10-foot distance between pipes in the right-of-way solely to accommodate SBSC.

[1] The essence of the challenges mounted by Schulz and Bosta relate to actions taken by BLM in approving both the original right-of-way application on April 26, 1989, and the subsequent March 20, 1990, amendment. Appellants did not, however, attempt to protest or directly appeal either the original application or the amendment to the right-of-way. Instead, in April 1991, they demanded that BLM terminate the right-of-way because of deficiencies in the application form and other actions that allegedly occurred with respect to construction associated with the right-of-way. When BLM denied their request that the right-of-way be terminated, they appealed and sought to raise these issues before us. This they cannot do.

All of the issues that Schulz and Bosta attempt to raise before the Board relating to the processing of SBSC's original application and the 1990 amendment are issues that would have been subject to a timely protest and ultimate appeal. Neither Bosta nor Schulz, however, chose to challenge BLM's consideration of SBSC's application at that time. ^{1/} Indeed, Schulz expressly admits that he did not oppose the original construction and that it was the subsequent extension of the sewer for public use to which he objected. See Schulz's SOR at 1.

If either Schulz or Bosta had desired to challenge the initial issuance of the right-of-way grant to SBSC, they were required to do so in a timely manner, *viz.*, no later than 30 days from issuance of the right-of-way grant. They did not. They may not now relitigate questions concerning how the application was processed under the guise of a request that the right-of-way be terminated. See, e.g., Keith Rush d/b/a Rush's Lakeview

^{1/} While Bosta asserts that, after receipt of the proposed right-of-way, he subsequently discussed this matter with the Area Manager, he did not file any formal protest at that time.

Ranch, 125 IBLA 346, 351 (1993); State of California, 121 IBLA 73, 115-16 (1991). Thus, all issues relating to the processing of the original right-of-way application, as well as the subsequent allowance of the amendment, are appropriately excluded from the instant appeal.

[2] The only issues properly subject to review are those assertions that operations under the right-of-way either violate the terms of the right-of-way grant or are otherwise in conflict with the law. While both Schulz and Bosta make a number of assertions of conflicts with both the terms of the right-of-way grant and with various provisions of state or Federal law, the Humm Report dealt with almost all of these matters in detail, and nothing has been presented on appeal that might vitiate the conclusions therein espoused. The one issue which we believe is worthy of direct analysis relates to a "technical" violation that BLM identified in the course of its analysis of the submissions from Schulz and Bosta.

The Humm Report noted that

[t]he Eagle Lake Area Manager issued a Decision amending right-of-way CACA 22476 on March 20, 1990, to include the installation of a potable water pipeline. The amendment required the potable water pipeline to be "placed no closer than 10 feet from the existing underground lines within the same right-of-way." The intent of this stipulation was to help prevent contamination of the potable water pipeline in the event that the sewer line ruptured. The holder (SBSC) is currently in technical violation of this term of the grant on a short portion of the right-of-way, because the holder has routed the two pipelines through one culvert under County Road A-1. However, SBSC has double-walled the pipelines in the area where they are closer together than ten feet, and this design change was reviewed and approved by the appropriate State and local public health regulatory agencies. These agencies have determined that the new design does serve the purpose of preventing contamination of the potable water pipeline in the event of a break in the sewer pipeline. This new design therefore meets the intent of the original ten-foot separation required by the right-of-way grant, and it would be appropriate for the Area Manager to amend the grant to allow for this design change.

(Humm Report at 14.)

In his November 9, 1992, determination, the District Manager requested that the right-of-way grant be amended in conformity with the suggestion of the Humm Report. On November 23, 1992, the Acting District Manager sent a memorandum to the Area Manager formally recommending amendment of right-of-way grant CACA-22476 in accordance with the November 9, 1992, determination. The right-of-way grant was accordingly reconciled with the District Manager's Decision and, effective November 23, 1992, the grant was amended to delete the stipulation related to sewer pipelaying within 10 feet of water pipeline in the same trench.

We note that the record supports the assertion of the District Manager that placement of the two lines less than 10 feet apart, where they pass through the culvert under County Road A-1, was "reviewed and approved by the appropriate State and local public health regulatory agencies," specifically the State of California Office of Drinking Water (ODW) and the Lassen County Public Health Department (LCPHD). See Decision at 2. There is no evidence that either Schulz or Bosta has sought to challenge that approval, other than indirectly through this Board.

Approval by the ODW is evidenced in a September 10, 1990, letter responding to an inquiry by the LCPHD, in which Gunther L. Sturm, the District Engineer, Lassen District, ODW, stated:

This is in response to your letter, dated September 4, 1990, in which you asked us to comment on the proposal to locate a domestic water distribution main and a sewage force main in a drainage culvert that crosses a county road.

* * * * *

The [California] Waterworks Standards [that are found in Cal. Code Regs. tit. 22, § 64630 (1997)] do not deal with a situation such as this. We feel it is reasonable to approve it, if the construction described above is followed, and if the system operators agree to periodically (at least every 6 months or whenever water main pressure is lost) to inspect the conduit to verify that there is not a problem with the force main.

(Ex. 3, attached to Humm Report, at 4.)

In addition, Humm reported a phone conversation that he had with Doug Ames, an Environmental Health Specialist with the LCPHD, on May 9, 1991, concerning Schulz's allegation that such placement violated "federal and state building codes":

Doug Ames said that Lassen Co. Health Dep. has permitted the water sewer system, and reviewed this situation EXHAUSTIVELY. The system meets their (Co.) health criteria, and Ames got approval from State Office of Drinking Water both before and after construction. St. ODW has approved the system. The two lines are double walled pipe, the water line is above the sewer line, and they are together only where they go through an open culvert under the Co. road. Mr. Ames said he has made several on-site inspections of this project and it meets Co. health criteria.

(Conversation Record, dated May 9, 1991; see Ex. 3 (Letter to Bosta from Ames, dated Oct. 11, 1990) attached to Humm Report, at 8-9.)

Whether relative placement of the potable water and sewer pipelines comports with state law is ultimately not for determination by BLM or this Board, but rather is under the jurisdiction of state and local authorities and, in the case of a dispute, the state courts. See, e.g., Nick DiRe, 55 IBLA 151, 154 (1981). Schulz and Bosta have presented no evidence to dispute the fact that the ODW and the LCPHD actually reviewed and approved placement of the potable water and sewer pipelines less than 10 feet apart in the culvert. The Board has no basis upon which to overturn their determinations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

James L. Burski
Administrative Judge